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13 Attorneys for Plaintiff CHRISTOPHER BOSH

14 IN THE UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 CHRISTOPHER BOSH, an individual,

17 Plaintiff,

18 vs.

19 LUIS ZAVALA, an individual,

20 Defendant.

Case No.

21 **EX PARTE APPLICATION FOR**
22 **TURNOVER ORDER UNDER FRCP 69(a)**
23 **AND CAL. CIV. PROC. CODE § 699**
24 **.040(a), AND FOR INTERIM ORDER**
25 **PROHIBITING THE TRANSFER OF, OR**
26 **CHANGE OF REGISTRANT**
27 **INFORMATION CONCERNING, THE**
28 **JUDGMENT DEBTOR LUIS ZAVALA**
AND REQUIRING TURNOVER OF
DOMAIN NAME HOLDINGS OF
JUDGMENT DEBTOR LUIS ZAVALA

(NO HEARING REQUIRED)

26 Judgment Holder Christopher Bosh ("Bosh") hereby makes this ex parte application (the
27 "Application") for a turnover order under Federal Rule of Civil Procedure 69(a) and California Code
28 of Civil Procedure section 699.040 prohibiting the interim transfer of the subject domain names and

1 requiring Judgment Debtor Luis Zavala ("Zavala") and third parties and requiring Zavala's domain
 2 name holdings to be transferred to Bosh so that those holdings may be sold in satisfaction of Bosh's
 3 federal court judgment against Zavala (the "Judgment"). Ex parte relief is proper pursuant to
 4 California Code of Civil Procedure section 699.040(a).

5 STATEMENT OF RELIEF REQUESTED

6 By this *Ex Parte* Application, Bosh seeks an order requiring that judgment debtor Zavala
 7 turnover the domain names identified in Exhibit F to the Declaration of Marc Trachtenberg in
 8 Support of Ex Parte Application for Turnover Order ("Trachtenberg Declaration" or "Trachtenberg
 9 Decl.") and preventing interim transfer of those domain names prior to them being turned over.

10 MEMORANDUM OF POINTS AND AUTHORITES

11 STATEMENT OF ISSUES TO BE DECIDED

12 1. Whether the Court should effectuate transfer of the domain names identified in
 13 Exhibit F to the Trachtenberg Declaration in partial satisfaction of Bosh's judgment against Zavala
 14 and

15 2. Whether the Court should issue an order preventing third parties from transferring or
 16 otherwise moving the domain names identified in Exhibit F to the Trachtenberg Declaration prior to
 17 their transfer to Bosh.

18 INTRODUCTION

19 Zavala a serial cybersquatter who has registered hundreds of domain names incorporating the
 20 names of various professional, college, and high school athletes as well as well-known entertainers,
 21 product names, and other entertainment properties, has actively evaded efforts to collect Bosh's civil
 22 judgment against him in violation of Court Order. As the Ninth Circuit has observed, under
 23 California law, domain names are personal property, and valuable personal property at that. Bosh
 24 seeks the turnover of Zavala's domain name holdings to satisfy the Judgment and protect other
 25 athletes and the general public from Zavala's illegal activities.

26 California law does not require a judgment holder such as Bosh to seek court intervention or
 27 even to give notice before levying upon a judgment debtor's personal property. Bosh finds itself
 28 handicapped in its collection efforts, however, by the unusual nature of the personal property at

1 issue. Bosh therefore also requests that, prior to ordering the turnover of Zavala's holdings, the
2 Court enter an interim order prohibiting Zavala, his agents or third parties from transferring or
3 altering registration information relating to Zavala's domain name holdings prior to transferring
4 them to Bosh.

5 At least two independent bases justify Bosh' request to proceed ex parte. The first is
6 California Code of Civil Procedure 699 .040—applicable under Federal Rule of Civil Procedure
7 69(a)—which explicitly permits a judgment holder to seek an order requiring the turnover of
8 personal property on an ex parte basis. The second is the nature of the property (domain names) here
9 at issue, insofar as Zavala or a third party could, in a matter of minutes, obscure Zavala's ownership
10 of, or even transfer, Zavala's domain name holdings, thus effectively thwarting Bosh's collections
11 efforts.

12 In addition to this Memorandum, Bosh submits two documents in support of the Application:

- 13 i) *Declaration of Marc Trachtenberg in Support of Ex Parte Application for Turnover*
14 *Order*, authored by the Bosh attorney whose Internet and other research has
15 uncovered several hundred of Zavala's domain names, which includes a list of
16 domain names that Bosh believes in good faith to be owned by or registered to
17 Zavala; and
- 18 ii) [Proposed] *Interim Order Prohibiting Transfer of, or Change of Registrant*
19 *Information Relating to, the Domain Name Holdings of Judgment Debtor Luis Zavala*
20 *and 2) Requiring Turnover of Domain Name Holdings of Judgment Debtor Luis*
21 *Zavala* (the "Turnover Order"), which Bosh respectfully requests that the Court enter
22 at its earliest convenience. Bosh intends to serve the Interim Order on Zavala, on
23 those domain name registrars through which Bosh believes Zavala to have registered
24 most or all of his holdings, and on central domain name registry Verisign, Inc.

25 FACTUAL BACKGROUND

26 **A. The Judgment**

27 Applicant Bosh is the holder of a federal court judgment against Zavala. As established by
28 the Writ, the Judgment, including interest and attorney's fees, is worth more than \$113,020.62.

1 Bosh has been unable to collect a cent from Zavala, primarily because it has experienced great
2 difficulty locating Zavala and identifying assets in relation to which a collection action might be
3 brought. (Trachtenberg Decl. at ¶ 13.)

4 **B. Zavala's Domain Name Holdings**

5 Through the use of Internet search engines and other investigative means, Bosh's attorney
6 Marc Trachtenberg has identified the pseudonym Hoopology.com used by Zavala (in conjunction
7 with Zavala's own email address) to administer his domain name holdings. (Trachtenberg Decl. at ¶
8 4-7.) Trachtenberg also has identified several hundred domain names - most registered through
9 domain name registrar GoDaddy.com - corresponding to that pseudonym and otherwise believed to
10 owned by and registered to Zavala. (*Id.* at ¶ 8.)

11 **C. Risk of Transfer of, or Change of WHOIS Registrant Information Relating to,**
12 **Zavala's Domain Name Holdings**

13 Generally speaking, WHOIS ownership and registration information can be changed at any
14 time by the registered owner or someone working on the registered owner's behalf. (*Id.* at ¶ 14) To
15 change an ownership record - or even a series of ownership records - all a registered owner needs to
16 do is log into their account with the independent registrar through which they processed the
17 corresponding registration, go to their owner profile, and input new information. (*Id.*)

18 Registrars typically do not verify that WHOIS ownership and registration information
19 pertains to an actual person or entity, much less to the person or entity that actually owns or controls
20 the domain name. (*Id.*)

21 **ARGUMENT**

22 **A. The Northern District Is the Proper Venue for the Application**

23 Title 28 of the United States Code, Section 1391 states, in pertinent part: "A civil action
24 wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise
25 provided by law, be brought [] in ... a judicial district in which ... a substantial part of property that
26 is the subject of the action is situated." The "property" at issue in this action, Zavala's domain name
27 holdings, are located in the District, insofar as the district contains Verisign, the sole registry for all
28 .com and .net domain names (Trachtenberg Decl. ¶ 15). *See, e.g.*, 15 U.S.C. § 1125(d)(2),

1 providing for venue in certain cybersquatting actions “in the judicial district in which the domain
2 name registrar, domain name registry, or other domain name authority that registered or assigned the
3 domain name is located”). Accordingly, the only logical venue for the Application is the District
4 from within which Verisign exercises exclusive control over the central registry of .com and .net
5 domain names. (*Id.*)

6 **B. The Application is Governed by California Law**

7 Federal Rule of Civil Procedure 69(a) states: “The procedure on execution, in proceedings
8 supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in
9 accordance with the practice and procedure of the state in which the district court is held, existing at
10 the time the remedy is sought. . . .” As the District is located in California, California law applies to
11 the Application and OS Holdings’ collection efforts.

12 **C. Zavala’s Domain Name Holdings Are Personal Property Subject to Execution**
13 **Under the Writ**

14 Under California law, domain names are personal property. *See Kreman v. Cohen*, 337 F.3d
15 1024, 1030 (9th Cir. 2003). As the Ninth Circuit observed, “like other forms of property, domain
16 names are valued, bought and sold, often for millions of dollars (citation omitted), and they are now
17 even subject to *in rem* jurisdiction, see 15 U.S.C. §1125(d)(2).” *Id.* Also under California law, all
18 property that is subject to enforcement of a money judgment, including property in the possession of
19 a third party, may be levied upon under a writ of execution. *See* Cal. Civ. Proc. Code §§ 695.010,
20 699.710, 700.040. Thus, Bosh may execute upon Zavala’s domain name holdings under the Writ.¹

21
22 ¹ One court has attempted to distinguish domain names as intangible property not subject to transfer
23 under Section 669.040. *See Palacio Del Mar Homeowners Assoc., Inc. v. McMahon*, Nos. G040349,
24 G040412, 2009 WL 1668294 at *3 (Cal. App. June 9, 2009). Even if the *Palacio* court’s
25 interpretation was universally accepted and followed, the case does not apply to the circumstances
26 present here. In *Palacio*, the domain name at issue was—unlike here—not in the judgment debtor’s
27 possession, which alone precluded transfer. *Id.* More significantly, the judgment debtor had a legal
28 right to hold and use the domain name in *Palacio* unlike Zavala who has no legal interest in the

D. Bosh Has a Statutory Right to Seek, and Needs, the Interim and Turnover Orders

California Code of Civil Procedure Section 699.040 states, in pertinent part:

(a) If a writ of execution is issued, the judgment creditor may apply to the court ex parte, or on noticed motion if the court so directs or a court rule so requires, for an order directing the judgment debtor to transfer to the levying officer either or both of the following :

(1) Possession of the property sought to be levied upon if the property is sought to be levied upon by taking it into custody.

(2) Possession of documentary evidence of title to property of or a debt owed to the judgment debtor that is sought to be levied upon.

An order pursuant to this paragraph may be served when the property or debt is levied upon or thereafter.

(b) The court may issue an order pursuant to this section upon a showing of need for the order.

Here, Bosh seeks “[p]ossession of the property sought to be levied upon” in the form of the Turnover Order. Although Section 699.040 typically contemplates transfer to a “levying officer,” who would sell the levied property at auction to satisfy the judgment, this is not practical here for two reasons:

1) The domain names in Zavala’s possession incorporate the names of various professional, college, and high school athletes as well as well-known entertainers, product, and other entertainment properties. Thus, the auctioning off of these domain names could result in purchase of the domain names by third parties who would put them to the same or

property because he holds the domain names Bosh seeks here in violation of federal anti-cybersquatting laws. *Id.* Zavala fails to satisfy the prerequisite interest in the property described in *Palacio* and is unable to avail himself of the protection that, under the *Palacio* court’s interpretation, might shield intangible property from transfer. *Id.* at *2.

1 similar illegal uses as Zavala, which would result in significant harm to the athletes and
2 owners of the product names and entertainment properties, as well as to the public at large.

3 2) While domain names are personal property under California law, they are not
4 physical property. Unlike other intangible property rights such as stocks or bonds though,
5 there is no paper certificate or other physical manifestation of ownership that a U.S. Marshall
6 or other levying officer could take possession of. Rather, ownership records are maintained
7 electronically by individual registrars. However, this ownership information is not
8 controlling as any person with access to the registrar account can do as they please with a
9 domain name housed in that account. Accordingly, for practical purposes, the owner of a
10 domain name is the entity with access to the registrar account that holds the domain name.
11 Transferring a portfolio of approximately 800 domain names to a registrar account under the
12 control of the U.S. Marshall Service would present a significant technical burden on the
13 Marshall Service, and thus is impractical. Moreover, as owner of the account holding the
14 domain names, the U.S. Marshall Service would be required to pay renewal and maintenance
15 fees for the domain names or the individual registrars would let the domain name
16 registrations lapse.

17 Accordingly, Bosh proposes that the Court order transfer of the domain names directly to Bosh.

18 Bosh will make reasonable efforts to contact the rightful owners of the domain names and
19 transfer the domain names to those individuals and companies. Upon contacting the rightful owner
20 of a domain name, Bosh would offer up the services of his web development company, Max Deal
21 Technologies, to manage the domain name and create a website for the person or company.
22 Regardless of whether the rightful owner chose to utilize the services of Bosh's company, Bosh
23 would transfer the domain name to the rightful owner at no charge upon request. The opportunity to
24 offer up his company's services to the rightful owners of the domain names currently in Zavala's
25 possession represents a financial benefit to Bosh, and the only realistic prospect Bosh has to collect
26 on the Judgment. This solution would also serve to stop the ongoing harm to a large number of
27 athletes and owners of the product names and entertainment properties, whose rights are currently
28 being violated as well as to the public at large who are confused by Zavala's illegal actions.

1 Therefore, the Turnover Order is necessary to Bosh's efforts to collect on the Judgment,
 2 because Bosh cannot without the cooperation of Zavala and third parties - namely, GoDaddy.com,
 3 other independent registrars, and Verisign—effectively transfer of Zavala's holdings to Bosh.
 4 (Trachtenberg Decl. ¶14) Because the Turnover Order is the only realistic prospect Bosh has for
 5 collecting on the Judgment and Bosh needs the requested order to effectively execute upon Zavala's
 6 domain name holdings, the Court should enter it as requested.

7 **E. The Application May, and Should , Be Heard Ex Parte**

8 As set forth above, Section 699.040 permits a judgment holder to apply for a turnover order
 9 ex parte unless “the Court so directs or a court rule so requires.” Bosh is aware of no applicable
 10 order—whether by the Court or any other tribunal requiring Bosh to provide Zavala notice of Bosh's
 11 collections efforts. Furthermore, the relevant Court rule, Civil Local Rule 7-10, expressly permits ex
 12 parte proceedings “if a statute . . . authorizes the filing of an ex parte motion in the circumstances
 13 and the party has complied with the applicable provisions.” Because Bosh has complied with
 14 California law in all respects, the Court should hear the Application on an ex parte basis.

15 In weighing the appropriateness of ex parte proceedings, the Court should bear in mind that
 16 this is a post-judgment collections action. Accordingly, due process and statutory protections
 17 relevant to a request for a pre-judgment freeze order do not apply. *See, e.g., Brown v. Liberty Loan*
 18 *Corp. of Duval*, 539 F.2d 1355, 1366 (CA Florida 1976) (reasoning that “[u]nlike the prejudgment
 19 creditor, the creditor here has a judicially awarded judgment”). The Court also should consider that
 20 this is a case in which the judgment debtor—an established cybersquatter who has already attempted
 21 to conceal his ownership and transferred a domain name to a registrar outside the United States in an
 22 attempt to evade the court's order—could transfer or obscure the assets in question in little time and
 23 with next to no effort.(Trachtenberg Decl. ¶ 14) The Court should therefore hear the Application ex
 24 parte.

25 **F. The Court Has the Inherent Power to Prohibit the Transfer of, or Change of**
 26 **Registrant Information Relating to , Zavala's Holdings**

27 Courts have the inherent power to preserve evidence, a power akin to administering
 28 membership of the bar and dismissing cases for failure to prosecute. *See Pueblo of Laguna v. United*

1 *States*, 60 Fed.Cl. 133, 135-38 (Fed.Cir. 2004); *see also Capricorn Power Co., Inc. v. Siemens*
 2 *Westinghouse Power Corp.*, 220 F.R.D. 429, 43233 (W.D.Pa. 2004) (holding that “motions for
 3 preservation of documents or things and orders granting such motions have become widely used in
 4 place of restraining orders or injunctions . . . It must [] be recognized that district courts have the
 5 power to control the discovery process and overall case management”). Even in the pre-judgment
 6 context, Courts also have the power to issue “freeze” orders designed to prevent a party from
 7 transferring assets otherwise available to satisfy a money judgment. *See Connecticut General Life*
 8 *Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 881-82 (9th Cir.2003).

9 Bosh seeks to execute on a writ of attachment issued pursuant to an unchallenged federal
 10 court judgment. (*Supra* at Section II A.) Accordingly, Bosh’s right to levy upon Zavala’s domain
 11 name holdings is beyond question. Additionally, Zavala will suffer no cognizable harm from an
 12 order prohibiting him from transferring or obscuring his ownership and registration of his domain
 13 name holdings, since under California law those holdings would be subject to direct levy. In
 14 contrast, a failure to freeze Zavala’s domain name holdings and to preserve related WHOIS
 15 registrant information would fundamentally, perhaps permanently, frustrate Bosh’s collections
 16 efforts, given the ease with which Zavala could (and has) changed that information or altogether
 17 transfer his domain name holdings as he has done in the past. (Trachtenberg Decl. ¶ 14) Because all
 18 the equities tilt in favor of freezing Zavala’s domain name holdings and entering of the Turnover
 19 Order, the Court should enter the Turnover Order at its earliest convenience.

20 CONCLUSION

21 For the reasons stated above, the Court should at its earliest convenience, enter the Turnover
 22 Order effectively transferring ownership and control of such domain names to Bosh for distribution
 23 to the proper owners of those domain names in satisfaction of the Judgment, for service upon Luis
 24 Zavala, and order Zavala to sit for a Judgment Debtor’s Examination.

25 DATED: August 14, 2009

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